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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 422

OFFICE EMPLOYES INTERNATIONAL UNION, LOCAL NO. 11, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. A, R. 261a–265a) is not yet reported. The decision and order of the Board is reported at 113 NLRB 987 (R. 229a–247a).

JURISDICTION

The judgment of the court below (R. 261a–265a) was entered on June 21, 1956. The petition for a writ of certiorari was filed on September 14, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the Board may properly decline to assert its plenary jurisdiction over labor organizations acting as employers.

2. Whether the court below erred in holding that the Board did not abuse its discretion in applying to labor organizations acting as employers the same standards for assertion of jurisdiction which it applies to other non-profit, non-commercial employers.

STATUTE INVOLVED

The pertinent provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), is set forth at page 2 of the Petition.

STATEMENT

I. THE BOARD'S FINDINGS AND CONCLUSIONS RESULTING IN DISMISSAL OF THE COMPLAINT [1]

Upon charges filed by petitioner, a labor organization seeking to represent certain office-clerical employees employed in Portland, Oregon, by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America and various locals, agents, and divisions of that union, collectively referred to herein as the Teamster organizations, the General Counsel of the Board issued complaints alleging that the Teamster organizations, acting in their capacity as employers of these employees, had

[1] Since the subsidiary findings of fact are not in dispute, record references herein are to the findings set forth in the Board's decision and in the trial examiner's intermediate report.

engaged in unfair labor practices in violation of Section 8 (a) (1), (2), (3), (4) and (5) of the Act (R. 81a–84a).[2] Following a hearing on these consolidated cases, a trial examiner of the Board issued his intermediate report finding, so far as here pertinent, that the Teamster organizations were each employers within the meaning of the Act, that they were engaged in commerce and that it would effectuate the policies of the Act for the Board to assert jurisdiction over them (R. 89a–98a, 185a–186a). In finding that it would effectuate the policies of the Act to assert jurisdiction over the Teamster organizations, the trial examiner treated all of them except the Security Plan Office as integral parts of a multi-state enterprise consisting of the International and all its affiliates (R. 94a–97a). He found that the annual flow of initiation fees and per capita taxes from all over the country, including the State of Oregon, to the national headquarters of the International in Washington, D. C., was over $6,000,000, more than sufficient to meet the Board's applicable minimum requirements ($250,000) for asserting jurisdiction over a multi-state enterprise (R. 85a–86a, 90a, 94a).

[2] The Teamster organizations, in addition to the International, consist of Joint Council of Drivers No. 37, composed of 23 Teamster locals; Locals 206 and 223, affiliated with the International; Teamsters Building Association, Inc., an Oregon corporation set up by six Teamster locals for the purpose of providing office space for themselves and the Oregon Teamsters' Security Plan Office; and Oregon Teamsters' Security Plan Office, also known as Teamsters Security Administration Fund, which administers 18 trust funds established pursuant to collective bargaining agreements between the locals comprising the Joint Council and some 2000 employers (R. 85a–89a).

In asserting jurisdiction over the Security Plan Office, he relied upon the fact that from its office in Portland, Oregon, it remitted to an insurance company in California policy premiums in excess of $2,000,000 annually, which was more than sufficient to meet the minimum outflow requirement ($50,000) applicable under the Board's standards for industrial enterprises (R. 97a–98a).

The Board agreed with the trial examiner that the Teamster organizations, in relation to their office-clerical employees here involved, were employers within the meaning of Section 2 (2) of the Act which excludes a labor organization from the definition of employer "other than when acting as an employer" (R. 232a). It held, however, that "the mere inclusion of labor unions in the statutory definition of 'employer' does not constitute a legislative ukase that, in all instances, their operations affect commerce and the assertion of the Board's jurisdiction over unions will effectuate the policies of the Act" (R. 233a). It held further that "the limited inclusion of labor organizations in the Act's definition of an 'employer' [is] consistent with the undisputed legislative intent to empower the Board to decide, pursuant to appropriate jurisdictional standards, whether to assert jurisdiction over particular employers, thus leaving the Board free to determine whether the operations of a union-employer, like any other employer, affect commerce within the meaning of the Statute, and, if so, whether Board assertion of its jurisdiction over such operations will effectuate the policies of the Act" (*ibid.*).

The Board found that in this case it would not effec-

tuate the policies of the Act to assert jurisdiction over the Teamster organizations (R. 230a). It noted that all of the Teamster organizations are non-profit organizations (R. 233a). Each exists and operates for the benefit of members of the Teamster unions and other employees in bargaining units which the Teamsters represent. The basic aim of the International, the Joint Council and the locals is to improve the working conditions of the workers, increase their job security and otherwise promote their general welfare. The Security Plan Office is a fiduciary engaged essentially in administering trust funds established by collective bargaining agreements with various employers, a typical labor union function in furtherance of employee welfare. The other Teamster organization, the Building Association, is only an instrumentality of 6 Teamster locals, none of which participates in any commercial transactions (R. 233a–234a).

The Board pointed out further that, with Congressional approval, it asserts jurisdiction over other non-profit employers "only in exceptional circumstances and in connection with purely commercial activities of such organizations" (R. 234a).[3] It held that the Teamster organizations' activities "directed to advancement of employee interests are, obviously, not substantial engagement in a commercial venture within the contemplation of the Board's jurisdictional principles for non-profit employers" (R. 234a). Applying the jurisdictional criteria which it had theretofore been applying to other non-profit employers, the Board accordingly declined to assert jurisdiction over these

[3] House Conference Report No. 510, 80th Cong., 1st Sess., 32 (1947).

union employers and dismissed the complaints (R. 235a). In doing so, the Board expressly overruled its ruling in a prior case (*Air Line Pilots Association*, 97 NLRB 929) in which it had asserted jurisdiction in a representation proceeding involving a union and its employees (R. 234a, n. 7).[4]

II. THE OPINION OF THE COURT BELOW

The court below, with Judge Bazelon dissenting, sustained the Board's dismissal of the complaints. It rejected petitioner's contention that Section 2 (2) of the Act by providing, in pertinent part, that "The term 'employer' * * * shall not include * * * any labor organization (other than when acting as an employer)" required the Board to exercise its plenary jurisdiction over labor organizations acting as employers. It agreed with the Board "that Section 2 (2) of the Act placed labor organizations in precisely the same status under the Act as are all other employers" (R. 262a–264a).

The court below held further that the Board's conclusions with reference to the non-profit character of the Teamster organizations, the reasoning with which

[4] Two Board members, dissenting, were of the view that the Board should assert jurisdiction over the Teamster organizations as integral parts of a multi-state enterprise, the standard applied by the Board in the *Air Line Pilots* case and by the trial examiner in this case (R. 239a–247a). A third Board member joined in the dismissal of the complaints because, in his view, Congress did not intend to include labor organizations within the meaning of employer when in relation to their own employees they are engaged, as in this case, solely in performing their functions as a labor organization (R. 236a–239a).

it supported its criteria for asserting jurisdiction and the applicability of those criteria to the Teamster organizations are rational and not arbitrary or capricious. It accordingly sustained the Board's exercise of its administrative discretion not to assert jurisdiction in this case (R. 264a).

ARGUMENT

1. The principal issue which petitioner presents is whether the Board is authorized under the Act to decline to exercise its plenary jurisdiction over labor organizations acting as employers. This Court has recognized—and petitioner, of course, does not dispute—that with respect to employers generally the Board may, in its administrative discretion, decline to assert its jurisdiction even though it is empowered by the statute to assert it. *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 684; *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 19. Petitioner contends, however, (Pet. 13–18) that with respect to unions acting as employers, the Board has no such discretion because of the statutory policy expressed in Section 2 (2) of the Act which defines the term "employer" and the legislative history of that section.

Section 2 (2) of the statute, in providing that "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include * * * any labor organization (other than when acting as an employer)," puts labor organiza-

tions in the category of employers as to their own employees but, as the court below held, "it did no more than that" (R. 264a). The legislative history of that section shows no intention to treat union employers differently from other employers. Indeed, if anything, it shows that Congress intended that they be treated the same. In addition to the legislative history recited by petitioner (Pet. 14–17), see Hearings before the Committee on Education and Labor, United States Senate, 73rd Cong., 2d Sess., on S. 2926. *Legislative History of the National Labor Relations Act*, 1935, p. 720.[5] Accordingly, we believe the Board and the court below were correct in holding that neither the statute nor its legislative history supports petitioner's contention that the Board must exercise juris-

[5] Thus during the course of the legislative hearings, Leslie Vickers, testifying on behalf of the American Transit Association before the Senate Labor Committee, urged that "the same restrictions put upon management should also be put upon labor organizations" and opposed as "unfair" the proposed blanket exclusion of labor organizations from the definition of employer. He stated that "the history of labor organizations becoming rich and powerful and entering into business is too recent to disregard in connection with this subject" and that "Under the exclusion as now contained in the bill it is entirely conceivable that labor organizations in themselves will displace industrial organizations." Leg. Hist. (1935) p. 720. Similarly, Dr. Gus W. Dyer, professor of economics, Vanderbilt University, told the Committee that because "Labor organizations may employ an unlimited number of workers to engage in all sorts of business activities," there was no reason to treat union employers differently than other employers (*ibid.*, at p. 940). When Congress inserted the parenthetical words "other than when acting as an employer" after the language excluding labor organizations from the definition of employer, it was apparently acting in response to critics who argued that union employers should be treated the same as other employers, not differently, as petitioner contends.

diction over union employers in all cases in which it is legally empowered to act.*

2. Petitioner further asserts (Pet. 18–20) that even if the Board may exercise its discretion in declining to assert jurisdiction over unions as employers, it acted arbitrarily in applying to unions the same administrative jurisdictional standards which it applies to other types of non-profit employers. More specifically, petitioner asserts (Pet. 19) that the legislative history of Section 2 (2) demonstrates that Congress merely approved "the Board's policy of not taking jurisdiction over religious, charitable, scientific, literary, or educational organizations, not 'non-profit' groups as a whole" and that, therefore, there is no warrant for the Board's treatment of union employers, for jurisdictional purposes, on the same basis as it treats the non-profit organizations specifically mentioned in the legislative history.

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* Petitioner suggests (Pet. 7, n. 10) that unions seldom, if ever, engage in commercial enterprises and that the practical effect of the Board's declination of jurisdiction in cases where unions are charged with engaging in unfair labor practices with respect to their employees who assist them in their organizational and representation functions is to decline jurisdiction over all union employers. This contention does not accord with the testimony of the witnesses who appeared at the legislative hearings, as shown above. Moreover, as various business and other publications have noted, unions engage in many types of businesses such as banking, insurance, newspaper publishing, house developments, laundries, cigar making, clothing manufacturing, shoemaking, and the sale of sundry supplies to United States merchant ships. *Nation's Business*, July 1955, pp. 46, 49–50; *Business Week*, January 1, 1955, p. 56; Peterson's *American Labor Unions* (N. Y. London, 1945); Millis and Montgomery, *Organized Labor*, 1945, pp. 344–352. And see *Bausch & Lomb Optical Co.*, 108 N. L. R. B. 1555; *Otter Trawlers Union, Local 58*, 100 N. L. R. B. 1187; Intermediate Report on *Guayama Bakers*, 27 L. R. R. M. 1322, 1323.

The Conference Report to which petitioner refers (Pet. 18) points out that Section 2 (2) specifically excludes only one type of nonprofit organization from the definition of employer and that the other six-nonprofit organizations which the House bill would have excluded were not specifically excluded in the final version of the Section because of the Board's policy of declining to assert jurisdiction over them save "only in exceptional circumstances and in connection with purely commercial activities." When the 1947 amendments were adopted, the Board had not had occasion to pass on the question whether it should assert jurisdiction over other types of non-profit organizations not specifically mentioned in the legislative history such as, among others, union employers. It would seem clear, however, that Congress was not purporting to make a comprehensive and exclusive listing of all non-profit organizations over which the Board might properly decline to assert jurisdiction because of that factor. Necessarily, Congress left that task to the Board, noting at the same time, for the Board's guidance in the future, its general approval of the Board's abstention from exercising jurisdiction over nonprofit employers save in the exceptional circumstances noted above. Accordingly, since the Teamster organizations are non-profit employers and are not engaged in any commercial venture in this case, the Board could appropriately treat them as it would any other non-profit, non-commercial employer in deciding whether to assert its jurisdiction.

3. As petitioner recognizes (Pet. 20), there are no contrary decisions. Moreover, the issue does not appear, at the present time, to be of substantial importance in the administration of the Act, warranting review by this Court. This is the first case to be decided by the Board during its entire history in which labor organizations have been charged with committing unfair labor practices as employers of their own employees.[7]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1956.

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[7] In one other case, *Otter Trawlers Union, Local 53*, 100 N. L. R. B. 1187, the Board found that a union as agent of owners of fishing vessels was a statutory employer of employees of those owners and that it had engaged in unfair labor practices in violation of Section 8 (a) (1), (2) and (3) of the Act. There, however, the Board asserted jurisdiction on the basis of the effect on commerce of the fishing business of the vessel owners.

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